IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978 No.78-1431

JOHNSON OIL COMPANY, INC.

Petitioner,

vs.

MOUNTAIN FUEL SUPPLY COMPANY,

Respondent.

REPLY BRIEF

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I N D E X

Table of Cases

Other Authorities

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REPLY BRIEF

The petitioner Johnson Oil Company, Inc. respectfully submits this Reply Brief pursuant to Rule 24(4) of the Rules of Practice of this Honorable Court in response to that portion of the opposition brief of respondent Mountain Fuel Supply Company which raised matters not presented by the Petition for Writ of Certiorari. Specifically, this brief is in response to Point I of respondent's brief alleging that Johnson Oil does not have standing to

petition. Although petitioner does have a response to the arguments raised by respondent in its opposition brief to the points raised in the original Petition for Certiorari, those arguments will not be discussed here in keeping with the said Supreme Court Rule 24(4).

POINT I

THE CERTIORARI PETITION OF JOHNSON OIL SHOULD NOT BE DENIED ON GROUNDS THAT BY ACCEPTING PAYMENT OF THE COMPENSATORY DAMAGE CLAIM, PETITIONER WAIVED ANY RIGHT TO PETITION THIS COURT FOR CERTIORARI REVIEW

1. Petitioner Johnson Oil does have standing to petition for certiorari under the Hougham Rule.

Respondent argues that all justiciable issues of controversy have been put to rest by the petitioner's acceptance of the compensatory damage award and that the acceptance stripped Johnson Oil of the standing necessary to petition this Court for certiorari. In so arguing, respondent carefully sidesteps the rule of law

clearly enunciated by this Court in United States v. Hougham, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960). In that case the Court held that:

> [i]t is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim.

Respondent seeks to limit the impact of the Hougham Rule by restricting its application to the unique facts of that case. In Hougham the judgment debtor argued that the payment was offered and accepted as an accord and satisfaction. However, at the Court of Appeals he had sought to avoid all liability even though the payment had already been accepted. This unique feature of the Hougham case does not render it inapposite to the case at bar. Justice Black characterized these

unique facts as illustrative of "the good sense underlying [the] rule." Id., 364 U.S. at 312. Obviously the rule was intended to have broader application than to just the fact of that one case.

It is argued that the general rule of law is that the right to accept the fruits of a judgment is inconsistent with the right to appeal therefrom. However, this general rule is subject to the limitation that an appeal will not be barred where a reversal of the judgment

> cannot affect the right of the party fo the benefit which he has secured thereby; as, for example, where there is no controversy as to his right for the amount for which the judgment was given, but he claims that he was entitled to a greater amount.

San Bernadino County v. Riverside County, 135 Cal. 618, 67 P. 1047 (1902). This analysis is consistent with what this Court outlined in Embry v. Palmer, 107

U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346 (1883). In that case the appeal was allowed because "the amount awarded, paid and accepted constitutes no part of what is in controversy." Id. 107 U.S. at 8. Therefore, a key element in determining whether the judgment is severable or divisible is to first determine what is in contr[illegible]y on the appeal. If the appeal cannot [illegible]t a decision already made, then t[illegible]al should be allowed.

T[illegible] the same analysis this Court followe[illegible] Hougham. At the Supreme Court level in that case the amount the respondent had already paid was no longer in dispute. Any decision of the Court in that case could not affect what was already paid. The same situation exists in the present case. The question raised on this appeal is whether the trial court erred in setting aside the punitive damage

award. The compensatory damage award which Mountain Fuel tendered is simply no longer a matter of controversy. A decision by this Court on the issue raised cannot affect the payment already accepted. Therefore, the exemplary damage claim is separable and divisible from the compensatory claim and this case comes under the first exception outlined by Respondent. Brief for Respondent at 14. See also Luther v. United States, 225 F.2d 495 (10th Cir. 1955); Carson Lumber Co. v. Saint Louis & San Francisco Railroad Co., 209 F. 191 (8th Cir., 1913). Respondent's reliance on Maw v. Weber Basin Water Conservancy District, 20 Utah 2d 195, 436 P.2d 230 (1968) misses the crucial issue of what is a controversy on the appeal. It is not a question of whether the punitive damages could have been awarded without the compensatory. Rather it is a

question of whether an acceptance of compensatory damages precludes an appeal on the punitive damages. Since there is a separate controversy on appeal as to the latter, these two types of damages are clearly severable.

2. There was no manifestation of intent on the part of Johnson Oil to support an inference that by accepting the payment, Johnson Oil acknowledged an accord and satisfaction.

Respondent relies heavily on the fact that the $47,393.24 was expressly tendered by Mountain Fuel in "full payment and satisfaction" of the judgment and that by accepting payment Johnson Oil acknowledged an accord and satisfaction of the judgment. Respondent admits that Johnson Oil did not intend to acknowledge the payment as an accord and satisfaction. Brief for Respondent at 16. Instead Johnson Oil clearly stipulated that the acceptance was not meant to limit Johnson Oil's right of

appeal on any portion of its counterclaim. Brief for Respondent, Appendix 4. The fact that Johnson Oil, prior to accepting payment, filed a Motion before the District Court to permit acceptance without prejudicing any appeal also indicates that Johnson Oil never intended the acceptance to be viewed as an acknowledgment of an accord and satisfaction.

Johnson Oil's manifestation of intent is a critical issue in the resolution of this problem according to case law. In Gadsden v. Fripp, 330 F.2d 545 (4th Cir. 1964), the Fourth Circuit held that the mutual intent of both parties to bring the case to a definitive conclusion is determinative where there has been a payment of a judgment. The court said:

> A payment of a judgment is not necessarily a bar to appeal. When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise

> and settle a disputed claim, an appeal may be foreclosed, but under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment. (Emphasis added.) (Footnotes ommitted.)

Id. at 548.

Respondent concedes that in the present case there was no mutual manifestation of intent to bring a definite conclusion to the litigation. Johnson Oil clearly stipulated the acceptance of the award was not intended to bring the litigation to a conclusion. The above rule has been characterized by one treatise writer as "sound" as an adherence to "elementary and familiar principles." See, Moores Federal Practice, Vol. 9 § 203.06 at p.719.

Conclusion on Standing

Johnson Oil has standing to petition this Court for Certiorari. The facts of this case fit squarely under the general rule enunciated by this Court in Hougham. The judgment is separable in that any decision of this Court cannot affect the amount paid. In addition, petitioner Johnson Oil has carefully maintained its right to appeal by expressly stipulating that it was not its intention to forego its right to appeal. Therefore, petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari.

Joseph C. Rust

AFFIDAVIT OF SERVICE

I, Kathy Pickett, depose and say that I am a secretary in the office of Dan S. Bushnell and Joseph C. Rust, and that on May 8, 1979 pursuant to Rule 33, Rule of Supreme Court, I served three copies by mail of the foregoing Reply Brief on each of the parties required to be served herein, as follows:

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Kathy Pickett